

Filed 7/18/19 In re D.D. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re D.D. et al., Persons
Coming Under the Juvenile
Court Law.

B293340
(Los Angeles County
Super. Ct. No.
18CCJP04914)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

J.R.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Pete R. Navarro, Referee. Reversed.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

In this dependency case (Welf. & Inst. Code, § 300 et seq.),¹ J.R. (Mother) challenges the sufficiency of the evidence supporting the jurisdiction findings against her. We conclude the evidence presented at the adjudication hearing was insufficient to support jurisdiction and therefore reverse the findings as well as the disposition order, as to Mother only.

BACKGROUND

This case concerns Mother, Oscar D. (Father),² their daughter D.D., and son O.D., who were four years old and 14 months old, respectively, when the Los Angeles County Department of Children and Family Services (DCFS) filed a dependency petition, arising from a June 5, 2018 incident of domestic violence between Mother and Father. The family had no prior involvement with the juvenile court, but DCFS had received an earlier domestic violence referral in September 2017, which was closed as inconclusive, as discussed in more detail below.

Prior Incident of Domestic Violence

¹ Further statutory references are to the Welfare and Institutions Code.

² Father is not a party to this appeal.

When the earlier incident of domestic violence occurred, Mother, Father, and the children were staying at the home of the children's paternal grandmother. Mother and Father had been in a relationship for approximately five years and living together for almost four years.

In the early morning hours on September 13, 2017, while the children were at the home but in another room, Mother and Father engaged in a verbal and physical altercation regarding Father's alleged infidelity. According to the police report, Father hit Mother on the arm with a closed fist around three times and threw a beer bottle at her, striking her lower leg. The paternal grandmother called the police, and Father was arrested. Father told an officer he had consumed about 18 beers in the nine hours before the incident. The police report states there were no prior reports of domestic violence involving this family.

The same day, DCFS received a telephonic referral regarding the incident. The caller reported Mother was "very protective [of] the children" and "very receptive" to the suggestion she obtain a temporary restraining order against Father. Two days later, on September 15, 2017, the criminal court issued a permanent, three-year restraining order, protecting Mother and the children. Mother encouraged Father's prosecution for domestic violence.

As stated in the August 6, 2018 Detention Report in this case, prior to DCFS contacting Mother about the domestic violence referral, she and the children moved from the paternal grandmother's home to the home of the children's maternal grandmother. At Mother's request, DCFS provided her with referrals to "community resources that c[ould] help provide her with additional support now that she ha[d] become a single

parent of two small children.” DCFS closed the domestic violence referral as inconclusive, after “determin[ing] that Mother ha[d] fully demonstrated her protective capacity by taking the necessary measures to ensure both her children and her continued safety,” and Mother “continue[d] to have the full emotional support of both the Maternal and Paternal Grandparents.”

At some point, the criminal court modified the permanent restraining order to provide for visitation between Father and the children. According to the Detention Report, the modification permitted “peaceful contact” between Mother and Father when custody of the children was exchanged and further indicated the paternal grandmother was “supposed to pick up the children from [M]other’s home.”

On December 18, 2017, DCFS received a referral regarding Father’s December 7, 2017 arrest for a probation violation for unlawful possession of a loaded firearm. Father was on probation for a domestic violence conviction, arising from the September 13, 2017 incident discussed above. Officers contacted Father as he drove up to the paternal grandmother’s home with three-year-old D.D. in the car. They arrested him when they found a loaded, registered firearm under the driver’s seat. The paternal grandmother informed Mother about Father’s arrest. As stated in the Detention Report, Mother and Father had no contact with each other and used the paternal grandmother to exchange custody of the children. DCFS determined the family did “not meet the need for DCFS intervention” and closed the referral as inconclusive.

Current Incident of Domestic Violence

On June 6, 2018, DCFS received a telephonic referral about a June 5, 2018 incident of domestic violence between Mother and Father, in one-year-old O.D.'s presence.

As set forth in the Detention Report, Mother described the incident as follows: Father called her on June 5, 2018 to ask if he could pick up D.D. for a visit, and she agreed. When he arrived at her apartment,³ he asked to use the bathroom. She declined and told him to leave. He left with D.D. and, an hour later, called to ask for diapers. Mother told him she was away from home. He accused her of dating another man, so she sent him a picture to demonstrate she was at an employment agency. She told him "he was not allowed in [her] home."

Shortly thereafter, the maternal grandmother called to inform Mother that Father had called her (the maternal grandmother), stating he needed diapers for D.D., and she (the maternal grandmother) had contacted the manager at Mother's apartment building and instructed the manager to allow Father to access Mother's apartment. Mother protested, telling the maternal grandmother D.D. no longer wore diapers, and the maternal grandmother should not have given Father permission to enter her apartment.⁴ Mother stated she was heading home, but she was afraid Father could be inside her apartment and might "try to harm her." The maternal grandmother told Mother

³ At some point, Mother and the children had moved out of the maternal grandmother's home and into their own apartment.

⁴ Consistent with Mother's account, the caller who made the referral to DCFS stated the maternal grandmother gave Father permission to access Mother's apartment.

“not to go to her apartment alone” and agreed to meet Mother there.

Mother drove around her apartment complex until the maternal grandmother arrived. She did not observe Father’s car. As the two women walked toward the complex with O.D.,⁵ Mother spotted Father out front and noticed he “appeared very upset.” The paternal grandmother was with him. Father indicated he had found a backpack “with male belongings” inside Mother’s apartment and asked her to identify the man. He “attacked” her in front of O.D. and the maternal and paternal grandmothers, punching her with a closed fist on her face and arms and pushing her against a car, as he yelled at her. Mother ran away and took out her cell phone. The paternal grandmother asked her not to call the police. As Father began hitting Mother again, the paternal grandmother grabbed Mother’s cell phone. Mother took her phone back and called the police. Father and the paternal grandmother fled.

Mother found her apartment “in complete disarray,” with her shoes, clothes, makeup, and purses “destroyed.” Her right eye and cheek were swollen and bruised and she sustained cuts on both lips. O.D. was unharmed. Officers responded and issued Mother a 10-day emergency protective order. Father was arrested on or about the day after the incident.

According to the police report from the incident, Mother told officers Father sent her “threatening text messages” on June 4, 2018, the day before the incident, including a photograph of a hand holding a revolver and statements indicating he would kill

⁵ Father did not bring D.D. to Mother’s apartment. He left her with her paternal aunt.

her if he discovered she was dating another man. Mother showed the text messages to the officers.

DCFS's Investigation of Current Referral

As stated in the Detention Report, on June 14, 2018, nine days after the current incident, a DCFS social worker contacted Mother by telephone to schedule a home visit to discuss the allegations in the referral. During the call, Mother stated she and the children had not had contact with Father since the incident and were “spending limited time at home due to [the] incident.”⁶ The social worker asked if Mother had obtained a restraining order. Mother reported there was a 10-day emergency protective order in place, but she had not yet applied for a permanent restraining order. The social worker “explained to [M]other the importance of filing a permanent RO [restraining order] in order to show her protective capacity.” Mother agreed to do so “as soon as possible.”

On June 18, 2018, the social worker spoke with the manager of Mother's apartment complex, who had not seen Mother there since the date of the incident and confirmed Father did not live at the complex. The manager observed Mother's swollen and bruised eyes after the June 5, 2018 incident and told the social worker that was the first time she had seen injuries on Mother.

Also on June 18, 2018, the social worker spoke with the maternal grandmother, who stated Mother and the children were

⁶ It is not clear from the record whether Father was in or out of custody at this point. He was out of custody for some time prior to the August 6, 2018 detention hearing. On or about July 23, 2018, he was arrested for a probation violation and remained in custody for the duration of the proceedings before us.

staying at her home. She confirmed she gave the apartment manager permission to allow Father into Mother's apartment.

On June 19, 2018, Mother contacted the social worker to report she had met with a detective assigned to Father's criminal case, and she planned to apply for a restraining order the next day. Mother also told the social worker she felt "intimidated" by law enforcement and DCFS. The social worker provided her with contact information for a domestic violence liaison at the police station. Mother contacted the liaison the same day. The following day, on June 20, 2018, the liaison assisted Mother in filing the necessary documents to obtain a restraining order. The liaison also talked to Mother about relocating, but Mother had not decided if she wanted to move.

On June 26, 2018, the social worker met with Mother and the children at the maternal grandmother's home. It was at this meeting that Mother provided the account of the June 5, 2018 domestic violence incident summarized above. According to the Detention Report, during this interview, Mother told the social worker the seemingly contradictory statements (1) that "she and [F]ather separated 3 months ago" because they "realized they did not get along," and (2) that she and Father "did not go back together" and "had limited contact" after the September 13, 2017 domestic violence incident.⁷ Mother indicated she had not had contact with Father or the paternal grandmother since the June 5, 2018 incident. Mother and the children were now sleeping at Mother's apartment because the maternal grandmother had other visitors staying at her home.

⁷ Apparently, the social worker did not ask for clarification.

When the social worker asked about the restraining order, Mother confirmed she had filed the necessary documents, but stated she had not yet served Father with the documents. She explained the maternal grandmother would be serving Father. The social worker recommended Mother serve Father “as soon as possible” and attend the hearing on the restraining order set for July 11, 2018. The social worker “reminded [M]other of the importance of showing her protective capacity.” Mother “assured” the social worker she would attend the hearing. Mother also agreed she and the children would participate in services related to case issues recommended by DCFS.

On July 3, 2018, the social worker contacted Mother to inquire if she had served Father with the restraining order papers. Mother stated she had not and would have the maternal grandmother take care of it that day. On July 11, 2018, Mother contacted the social worker to report that she was at the courthouse but had missed the restraining order hearing set for earlier in the day because she forgot about it and arrived late.

On July 13, 2018, the social worker conducted a home visit at Mother’s apartment. Mother showed the social worker a document she had received at the courthouse that she could not read because it was only in English.⁸ The social worker translated the document, explaining to Mother that because she did not appear at the hearing, her request for a restraining order was discharged, the temporary protective order was dissolved, and the matter was dismissed without prejudice.

⁸ Mother was a Spanish-speaker and utilized an interpreter at court hearings.

As stated in the Detention Report, when the social worker told Mother “she would need to start the entire process to obtain a RO again,” Mother “appeared aggravated as she started raising her voice saying that she had priorities in life. Mother stated she felt it was more important to provide for her children and to pay the bills. Mother stated she need[ed] to find a job and run errands related to the children.” Mother told the social worker “she want[ed] to comply with [DCFS]’s recommendations, but expressed feeling overwhelmed.” She also expressed that she wanted “to move on with her life,” “away from” DCFS. She “assured” the social worker that Father “would not hurt the children,” and stated he had not attempted to contact her or the children. She informed the social worker she had signed paperwork to initiate therapy sessions at an agency that addresses domestic violence issues.

On July 16, 2018, the social worker spoke with the domestic violence liaison, who did not believe Mother was “careless about protecting her children,” but believed Mother was intimidated by the judicial system, DCFS, and her language barrier. The liaison was “willing to continue helping [M]other navigate the legal process.” Two days later, on July 18, 2018, Mother contacted the social worker to report she was at the courthouse, filing a new application for a restraining order.

On July 24, 2018, Mother contacted the social worker to inquire if the children could visit the paternal grandmother because D.D. missed her and asked about her. The social worker recommended against it, given the paternal grandmother’s presence during Father’s attack and her attempt to obstruct Mother from contacting the police.

On July 27, 2018, the paternal grandmother contacted the social worker to discuss the case. She had last seen Mother and the children when she dropped D.D. off after a visit Mother arranged with her shortly after the June 5, 2018 incident of domestic violence. According to the paternal grandmother, at the time of the June 5, 2018 incident, Father was saving money for a down payment on a residence because he and Mother planned to move in together. Father called the paternal grandmother on the date of the incident to tell her he believed Mother “was talking to another man.” The paternal grandmother decided to meet Father at Mother’s apartment because she knew Father was upset, and she wanted to calm him down. She took Mother’s phone to “deescalate the situation.” She believed Father was intoxicated at the time of the incident.

On August 3, 2018, DCFS filed a dependency petition under section 300, subdivisions (a), (b), and (j), alleging the children were at risk of harm due to Father’s physical abuse of Mother and Mother’s failure to protect the children.⁹ In the Detention Report, DCFS recommended the juvenile court remove the children from Father and release them to Mother, stating: “It is considered that minors are safe in [M]other’s care after [M]other showed her protective capacity by calling Law Enforcement, she had not tried to be in contact with [F]ather, and she expressed that she is willing to follow [DCFS]’s recommendations. Mother expressed that she is willing to ensure the safety and well-being of her children.”

⁹ The petition included additional allegations against Father regarding his possession of a loaded firearm in his car while D.D. was a passenger.

Mother appeared at the August 6, 2018 detention hearing. The juvenile court ordered the children detained from Father and released to Mother.

Jurisdiction

On August 21, 2018, Mother spoke with the social worker who prepared the September 26, 2018 Jurisdiction/Disposition Report. Mother declined to provide another statement about the domestic violence incidents but told the social worker: “I have always been a protective mother. I have always appeared in court hearings and I have also testified against [Father]. I have requested a restraining order against [Father], and the hearing for that is coming up on August 29, 2018. I feel very overwhelmed. I feel like I’m the one who keeps getting investigated and I am taking care of my children and I feel like nothing happens to [Father] because I’m the one that keeps getting visits from different people and I can’t keep up with everyone that visits me. I feel like I don’t even know who is who anymore.’” Mother told the social worker she and Father “separated after the first domestic violence incident in September 2017 and ha[d] not lived together since then.” Mother also stated she was in the process of arranging mental health services for the children through an agency called “Victims of Crime.”

The social worker contacted Father by telephone at the detention facility where he was incarcerated. Father declined to provide a statement about the domestic violence incidents because his criminal case was still pending. Father told the social worker he and Mother “got back together” after the September 15, 2017 restraining order was modified (to allow them to have peaceful contact with each other when exchanging custody of the children), and they “broke up” again after the June

5, 2018 domestic violence incident. Father stated he wanted “to reconcile” with Mother but was unsure if it would happen.

DCFS stated in the Jurisdiction/Disposition Report that “the children remain[ed] conditionally safe” in Mother’s home.

In a Last Minute Information for the Court, filed September 24, 2018, DCFS informed the juvenile court about a September 7, 2018 home visit, during which Mother told the social worker four-year-old D.D. returned from a recent visit with the paternal grandmother, stating the paternal grandmother asked her personal questions about Mother, including who visited and slept in the bed with Mother. Mother also reported she personally heard the paternal grandmother ask D.D. such questions. Mother stated she had no objection to D.D. visiting the paternal grandmother if the paternal grandmother “was going to be appropriate” with D.D.

During the same September 7, 2018 home visit, Mother also reported she learned from the maternal grandmother (who heard from the paternal grandmother) that Father might be released from custody on bail in a few days.¹⁰ Mother expressed fear that Father would come to her home. The social worker asked if she had a plan in that event, and Mother responded, “call 911.” Mother told the social worker she wanted to relocate. Someone from Victims of Crime contacted her to discuss services, including relocation, but she could not talk on the phone at the time because she was driving, so she asked the person to call her back. The person did not call back, and Mother did not contact the agency because “she did not know who to ask for.” Mother

¹⁰ Father was not released from custody prior to the September 26, 2018 adjudication/disposition hearing.

informed the social worker she attended the court hearing on her application for a restraining order but “was told that the restraining order would be issued through Dependency Court.” Mother did not enroll in services after DCFS provided referrals for parenting and domestic violence support classes, explaining that the class times conflicted with drop off and pick up times at D.D.’s school.

Mother and Father appeared at the September 26, 2018 adjudication/disposition hearing.¹¹ The juvenile court heard argument in favor of dismissing the petition from Mother’s and Father’s counsel, and in favor of sustaining the petition from DCFS’s and minors’ counsel. The juvenile court sustained the following allegation against Mother and Father under section 300, subdivisions (a), (b), and (j):

“On 6/5/18, [Father] violently attacked [Mother] in the presence of [O.D.]. The father repeatedly struck the mother in the face causing the mother to sustain swelling, and bruising to the mother’s cheek and eye, and cuts to the mother’s upper and lower lip, and inside the mother’s mouth. The father struck mother’s arms and face with father’s fists and pushed mother against a vehicle. The father destroyed the mother’s personal belongings in the home. On 6/6/18, the father was arrested for Inflict Corporal Injury Spouse/Cohabitant. On 9/13/17, the father struck the mother’s knee with a beer bottle. [Mother] failed to protect the children by continuing to have a relationship with [Father]. On 9/13/17, the father was arrested for Inflict Corporal Injury Spouse/Cohabitant and subsequently convicted. Such violent conduct by [Father] against [Mother] and mother’s lack of

¹¹ Father appeared in custody.

protection of the children endangers the children's physical health and safety and places the child O[D.] and the child's sibling D[D.] at risk of serious physical harm, damage, danger, and physical abuse.”¹²

Thereafter, the juvenile court heard argument on disposition and declared the children dependents of the court and removed them from Father's custody and placed them in Mother's care, with DCFS supervision and services. The court also issued a temporary restraining order against Father, protecting Mother and the children but permitting monitored visitation between Father and the children.

DISCUSSION

Mother challenges the sufficiency of the evidence supporting the jurisdiction findings against her. DCFS argues we need not reach this issue because even if we reverse the jurisdiction findings as to Mother, jurisdiction over the children will continue based on the unchallenged jurisdiction findings against Father. Because the jurisdiction findings against Mother could prove prejudicial in future dependency, family law, or other matters, we agree with Mother that her challenge to these findings is not moot. Accordingly, we address the merits of her appeal. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 [“we generally will exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on

¹² The juvenile court also sustained allegations against Father under section 300, subdivisions (b) and (j) regarding his possession of a loaded firearm in his car while D.D. was a passenger.

appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) ‘could have other consequences for [the appellant], beyond jurisdiction’ ”.)

“In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court.” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.)

Count a-1

Mother contends there is insufficient evidence to support jurisdiction finding a-1 against her, quoted above. We agree.

Jurisdiction under section 300, subdivision (a), is appropriate where “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child’s parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child’s siblings, or a combination of these and other actions by the parent or guardian that indicate the child is at risk of serious physical harm. . . .” (§ 300, subd. (a).)

DCFS alleged Mother failed to protect the children, conduct that falls squarely under section 300, subdivision (b), as discussed below. Subdivision (a) is inapplicable to the allegations against Mother. She engaged in no conduct which could have resulted in the nonaccidental infliction of serious physical harm to the children. Accordingly, we reverse finding a-1, as to Mother only.

Count b-1

Mother contends there is insufficient evidence to support jurisdiction finding b-1 (which is identical to the language in finding a-1). Again, we agree with Mother.

Jurisdiction under section 300, subdivision (b), requires proof “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child” (§ 300, subd. (b).) In deciding whether there is a substantial risk of serious physical harm, within the meaning of section 300, subdivision (b), courts evaluate the risk that is present at the time of the jurisdictional hearing. “While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824, abrogated in part on another ground in *In re R.T.* (2017) 3 Cal.5th 622, 627-629.)

“Physical violence between a child’s parents may support the exercise of jurisdiction under [section 300,] subdivision (b) but only if there is evidence that the violence is ongoing or *likely to continue* and that it directly harmed the child physically or placed the child at risk of physical harm.” (*In re Daisy H.* (2011)

192 Cal.App.4th 713, 717, italics added; *In re T.V.* (2013) 217 Cal.App.4th 126, 134 [“Exposing children to recurring domestic violence may be sufficient to establish jurisdiction under section 300, subdivision (b)”].)

At the time of the adjudication hearing, there was no evidence of a substantial risk the children would suffer serious physical harm or illness as a result of Mother’s failure to protect them (and it is undisputed the minors had not suffered past physical harm or illness). Father was incarcerated, and the record did not indicate Mother intended to resume a relationship with him when he was released. The juvenile court issued a restraining order protecting Mother (while permitting monitored visitation between Father and the children). The court concluded the children’s placement in Mother’s care was safe and appropriate.

In support of its position the findings against Mother were proper, DCFS argues substantial evidence showed Mother “remained in a relationship with [F]ather [during the period between the two incidents of domestic violence], did not take his threats seriously, remained loyal to the paternal grandmother, and was hesitant to engage in programs that provided help and support.” None of this constitutes substantial evidence of a substantial risk the children would suffer serious physical harm or illness as a result of Mother’s failure to protect them. Any concern Mother would engage in conduct leading to a violent confrontation with Father in the children’s presence was speculative and not evidence of a substantial risk the children would suffer serious physical harm or illness. There was no “ongoing” violence in Mother’s home, and there was insubstantial evidence indicating violence between Mother and Father was

“likely to continue.” (In re Daisy H., supra, 192 Cal.App.4th at p. 717, italics added.)

Accordingly, we reverse finding b-1, as to Mother only.

Count j-1

Count j-1 is identical to the language in findings b-1 and a-1. Jurisdiction under section 300, subdivision (j) requires a finding “The child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions.” (§ 300, subd. (j).) Because there is insufficient evidence Mother abused or neglected either of the children under subdivision (a) or (b), for the reasons explained above, there is no basis for jurisdiction under subdivision (j), and finding j-1 must be reversed, as to Mother only.

We also reverse the disposition order as to Mother because it was based on the unsupported jurisdiction findings against her.

DISPOSITION

The disposition order is reversed as to Mother only.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.